United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Docket No. 74-1267

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Pages

IN THE
United States Court of Appeals
For the Second Circuit

WILLIAM HARRINGTON,

Appellant,

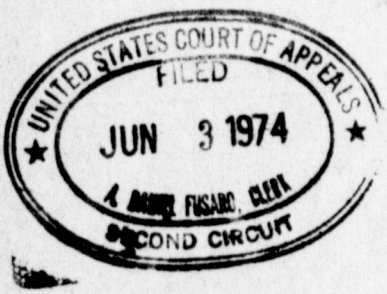
—*vs.*—

ROBERT FINCH, Secretary of the Department of Health, Education, and Welfare.

Appellee.

On appeal from the United States District Court, Northern District of New York

BRIEF FOR APPELLEE



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BRIEF FOR APPELLEE

STATEMENT OF ISSUES

I. The District Court properly upheld the principle of administrative *res judicata* as foreclosing the Claimant's second application for disability income benefits.

II. The alternative finding of the Hearing Examiner that the Claimant was not under a "disability", as defined by the Social Security Act, is supported by substantial evidence, and accordingly is not subject to judicial review.

STATEMENT OF THE CASE

The Appellee, the Secretary of the Department of Health, Education, and Welfare, generally agrees with the facts outlined in pages three and four of Appellant's Brief but feels that additional facts should be brought to the Appellate Court's attention in view of the issue-oriented "facts" which follow thereafter.

The Claimant, as the District Court noted, (R. 109), after his original application for disability income benefits dated July 24, 1967, had been denied on October 10, 1967, (R. 63, pp. 22 - 23) and the Claimant had been notified of the adverse decision and the six month period in which to request a re-examination of his claim (R. 63, p. 24), timely filed a Request For Reconsideration on January 4, 1968. (R. 63, p. 26).

On February 6, 1968, Harvey Hayman, M.D., a specialist in Internal Medicine, examined the Claimant and concluded that the Claimant was a "well nourished white male who appears neither acutely nor chronically ill," (R. 63, p. 94), and that the Claimant's "ear disease is minimal and that there is no evidence of disease in the left neck, or cardio-pulmonary disease. I believe that this man's symptoms are all out of proportion to any organic disease. . . ." (R. 63, p. 95).

Sherwin S. Radin, M.D., a board-certified psychiatrist, who thereafter examined the Claimant on Dr. Hayman's recommendation, concluded that the Claimant suffered from psycho-somaticism in which physical deficiencies are unconsciously grossly over-exaggerated by the workings of the mind. (R. 63, p. 102).

The Claimant's physician, Leo Baum, M.D., a general practitioner, on September 12, 1967, stated, "In spite of numerous examinations by specialists and a surgical exploration, this diagnosis (of congenital cysts) could not be substantiated as yet." (R. 63, p. 84). This physician concluded that the Claimant was "employable in a restricted capacity," (R. 63, p. 85) although Dr. Baum preferred to label this reduced capacity, "total disability".

On March 13, 1968, the Social Security Administration concluded that neither the Claimant's physical nor psychiatric impairments were severe enough to render him totally disabled, within the statutory definition of the term, so as to prevent him from engaging in "any substantial gainful work". (R. 63, p. 28).

The Claimant was so notified on March 27, 1968, in the Notice of Reconsideration Determination which concludes, "If you believe that the reconsideration determination is not correct, you may request a hearing before a hearing examiner of the Bureau of Hearings and Appeals. If you want a hearing, you must request it not later than 6 months from the date of this notice." (R. 63, p. 30).

The Appellant, in his Brief at pages eight and thirteen, concedes that "For reasons that do not appear in the record, Appellant failed to request a hearing by September 27, 1968," at which time the aforementioned six month period expired.

More than eight months after the Notice of Reconsideration Determination had been mailed, the Claimant filed a second application for diability insurance benefits on December 4, 1968, allegedly on the advice of an unidentified employee of the Social Security Administration. In view of the prior expiration of the six month review period, this "advice," if it, in fact, was given, could in no way have prejudiced the Claimant.

Appellant in his Brief, at page eight, readily admits that the Claimant "had no new information to present." (R. 31, ¶ 6).

On February 13, 1969, the Social Security Administration denied the Appellant's second claim and stated the basis for its determination as "administrative *res judicata,*" (R. 63, p. 35), in that " . . . the new application presents no new facts and involves the same law and issues . . . as the previous application of 7/24/67 . . . ."

On February 19, 1969, the Claimant was notified by mail of this adverse determination. He was further advised of the six month review period (R. 63, p. 36).

On June 19, 1969, the Claimant timely filed a Request For Reconsideration indicating that he had "no further medical evidence to submit for (the) period prior to 6/30/65"— the date the Claimant last met the earning's requirements of the Act. (R. 63, p. 38).

On June 27, 1969, the Claimant was notified that his second application had been reconsidered and that the denial of benefits had been upheld. He was further advised of his right to request a hearing within six months of the notice. (R. 63, p. 39).

A hearing was requested by the Claimant on August 20, 1969, (R. 63, p. 16), and on December 18, 1969, Hearing Examiner Jacob Friedes decided that the Claimant was not entitled to disability income benefits on the basis of administrative *res judicata*, and in the alternative, on the grounds that the Claimant did not meet the statutory definition of "disabled."

Since the Secretary feels that the remaining facts of this litigation are adequately brought to the Appellate Court's attention in the Appellant's Statement, the history will not be reiterated here.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY UPHELD THE PRINCIPLE OF ADMINISTRATIVE RES JUDICATA AS FORECLOSING THE CLAIMANT'S SECOND APPLICATION FOR DISABILITY INCOME BENEFITS.

As the District Court properly noted, the rule of the Second Circuit, regarding administrative *res judicata*, has been recently stated in *Thompson* v. *Richardson*, 452 F.2d 911, 913 (2d Cir. 1971), (R. 114, 115), in which this Court held,

> The Social Security Act, 42 U.S.C. §405(b) authorizes the Secretary of Health, Education and Welfare to set by regulation the time for requesting a hearing, and it is firmly established that, in the absence of exceptional factors, administrative finality (or administrative *res judicata*) forecloses reopening or review of adverse determinations which have become final under the regulations. (cites omitted).

In the present case, the District Court has ruled that the Claimant has failed to demonstrate, "the 'exceptional factors' referred to in *Thompson*", *supra*.

It should be again emphasized here that when originally, (October 25, 1967), notified of the denial of disability income benefits on his initial application, and notified of the six month review period (R. 63, p. 24), the Claimant, without the advice of counsel — the same absence upon which Appellant now so heavily relies — timely filed a Request For Reconsideration. (R. 63, p. 26).

The Claimant can give this Court no concrete reasons for his failure to similarly demand a review of the adverse reconsideration determination of which he was notified on March 27, 1968. (R. 63, pp. 29-30) [See also: Appellant's Brief, pp. 8, 13].

As the Appellant has stated, the applicable Regulation clearly provides that,

> The Administrative Law Judge may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:
>
> (a) *Res judicata.* Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review . . . . (20 C.F.R. §404.937). [See also: 20 C.F.R. §§404.908, 404.916].

The Appellant further admits in his Brief, at page fifteen, that the second application contains no new and material medical evidence which would overcome the doctrine of administrative *res judicata* and permit a reopening of the claim pursuant to 20 C.F.R. §§404.957, 404.958(a). The Appellant has also not raised the issue of the presence of any other factors constituting "good cause" under 20 C.F.R. §404.958 (b) and (c). Therefore, the District Court was correct in ruling that "the reopening provisions are inapplicable." (R. 115).

To overcome the weight of authority both in this Circuit and elsewhere, the Claimant relies upon *Staskel* v. *Gardner*, 274 F. Supp. 861, 865 (E.D. Pa. 1967) for an example of the doctrine of administrative *res judicata* being judicially relaxed.

In *Staskel, supra*, that District Court, in its *dicta*, after holding that the decision of the hearing examiner, denying the claimant benefits, should be reversed on the grounds that said denial was not based on substantial evidence, stated,

> Finally, this Court is reluctant to approve the use of a technical defense such as res judicata to bar a semiliterate, uncounseled claimant from benefits to which she may well be entitled, particularly where the prior proceedings relied upon as a bar were perfunctory administrative proceedings of a nonadversary nature and where the very notice of denial could well suggest to a person such as the claimant that the denial was not final.

The present case can be distinguished on at least three grounds:

1. The District Court, below, in its *dicta*, stated, "the Secretary's decision could not be disturbed in any event as it is supported by substantial evidence" (R. 106);

2. The Appellant is clearly literate, having completed a seventh grade level of education, (Appellant's Brief at page five), and having completed the application forms and other documents with apparently little or no difficulty; and

3. In *Staskel, supra*, the plaintiff had failed to request a reconsideration of the original benefits' denial, whereas the present Appellant had, on his own, requested reconsideration of the original benefits' denial on January 4, 1968. (R. 63, p. 26).

The second authority cited by the Appellant is *Gilliam* v. *Gardner*, 284 F. Supp. 529 (D. S.C. 1968). That District Court ruled that administrative *res judicata* did not apply when the initial application had not reached the hearing stage of consideration.

That District Court's holding has been specifically criticized by the Third Circuit as an incorrect judicial interpretation of the

principle of administrative *res judicata* and inconsistent with Congressional purpose. [See: *Domozik* v. *Cohen*, 413 F.2d 5, 8 (3rd Cir. 1969)].

Finally, Appellant relies upon *Grose* v. *Cohen*, 406 F.2d 823 (4th Cir. 1969). That Court, at page 625, after citing the "good cause" ground for reopening an appeal under 20 C.F.R. §404.958(c), reasoned that if the examiner's decision contained "error on the face of the evidence" and could, *ipso facto*, be reopened, the doctrine of administrative *res judicata* could similarly not be a bar to recovery. Appellant has not contended that there exists that type of "error", which would permit reopening, so the *Grose* case reasoning is clearly inapplicable to the present appeal.

[Cf. *Easley* v. *Finch*, 431 F.2d 1351, 1353 (4th Cir. 1970) in which this "exception" was categorized by the Fourth Circuit to be only a restatement of 20 C.F.R. §404.958(c); *Hughes* v. *Finch*, 432 F.2d 93, 94 (4th Cir. 1970); and *Lucas* v. *Gardner*, 453 F.2d 1255, 1256 (4th Cir. 1972)].

The holding of *Thompson* v. *Richardson*, *supra*, since the Appellant has not provided this Court with any "exceptional factors", must necessarily determine the outcome of this appeal — that relief is barred by administrative *res judicata*.

POINT II

THE ALTERNATIVE FINDING OF THE HEARING EXAMINER THAT THE CLAIMANT WAS NOT UNDER A "DISABILITY," AS DEFINED BY THE SOCIAL SECURITY ACT, IS SUPPORTED BY SUBSTANTIAL EVIDENCE, AND ACCORDINGLY IS NOT SUBJECT TO JUDICIAL REVIEW.

The District Court, below, based its decision on administrative *res judicata* but noted that "the Secretary's decision could not be disturbed in any event as it is supported by substantial evidence." (R. 106).

The Act's definition of "disability" is a rather restrictive one—employing the "*any* occupation" test vs. the *own* occupation test.

According to 42 U.S.C. §423(d)(1), "The term 'disability' means — (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . ."

The Act further provides, in 42 U.S.C. §423(2), that for purposes of paragraph (1)(A), *supra*, "an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

The Claimant's general practitioner, Leo Baum, M.D., has never been able to substantiate that physician's "tentative" diagnosis of congenital (teratological) cysts with incomplete fistulas. (R. 63, pp. 82, 83, 84).

This general practitioner further renders a diagnosis of otitis media of the right ear "which flares up from time to time", muscle pains, and angina pectoris. (R. 63, pp. 82, 83, 84). Dr. Baum concludes that the claimant is employment (sic) only in a very limited way . . . ." (R. 63, p. 83) The later reports of this general practitioner are similar in conclusions.

On the other hand, Harvey Hayman, M.D. a specialist in Internal Medicine, noted that there was a small perforation of the right eardrum but that the right ear canal was clear. (R. 63, p. 94). The Claimant's electrocardiogram and chest x-ray were "within normal limits," and the Claimant's ear disease (right otitis media with perforation of the right ear drum) was "minimal." (R. 63, p. 95). Further, this specialist determined

that the Claimant did not have angina pectoris (R. 63, p. 99), and that most of his "symptoms" originate mentally rather than organically. (R. 63, p. 95).

This psycho-somanticism was similarly diagnosed by Sherwin S. Radin, M.D. a board-certified psychiatrist, who further noted that the Claimant was simultaneously coherent and logical (R. 63, p. 102).

In *Harmon* v. *Finch*, 460 F.2d 1229, 1231 (9th Cir. 1972); *cert. denied*, 409 U.S 1063 (1972); *reh. denied*, 410 U.S. 918 (1973), the Ninth Circuit noted that Section 205(g) of the Social Security Act (42 U.S.C. §405(g)), directs that "the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive," and, therefore, not subject to judicial review, and held that the Claimant was not "disabled" within the definition of the Act. The Ninth Circuit further noted, at page 1230, that "equity" could not enable the Court to "disregard the provisions of the Social Security Act" which narrowly define the term, 'disability'."

In view of the conclusions of the specialists and the lack of any surgical or organic substantiations of the general practitioner's diagnosis, the "substantial evidence" is that the Claimant's ailments exist in his mind, if at all, and that he is not "disabled" within the meaning of the Act, and, accordingly, the Secretary's denial of benefits is not subject to judicial review.

CONCLUSION

The Secretary of the Department of Health, Education and Welfare, Defendant-Appellee, respectfully submits that the District Court's Judgment, denying the Plaintiff-Appellant disability income benefits under the Social Security Act, be in all respects affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Northern District of New York and is a person of such age and discretion as to be competent to serve papers.

That on May 31, 1974, she served two copies of the attached BRIEF FOR APPELLEE by placing said copies in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Main Post Office, Clinton Square, Syracuse, N.Y. 13201

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Viola A. Myers
VIOLA A. MYERS

Sworn to before me this
31st day of May, 1974.

Richard K. Hughes
Notary Public

RICHARD K. HUGHES
Notary Public in the State of New York
Qualified in Onondaga County
My Commission Expires March 30, 1975